

BRB No. 92-2082

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| HENRY A. McLEOD, JR. |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| INGALLS SHIPBUILDING, |) | DATE ISSUED: |
| INCORPORATED |) | |
| |) | |
| Self-Insured |) | |
| Employer-Petitioner |) | DECISION and ORDER |

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples and Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (89-LHC-1438) of Administrative Law Judge Richard D. Mills rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant filed a claim under the Act seeking benefits for a noise-induced hearing loss based on audiograms administered on April 25, 1988, which revealed a 1.5 percent binaural hearing impairment, and on July 25, 1989, which indicated a 1.88 percent binaural hearing loss. The parties stipulated to a compensation rate of \$154.24. After determining that employer is responsible for claimant's work-related hearing loss, the administrative law judge awarded claimant benefits for a 1.69 percent binaural hearing loss, the average of the two audiograms, pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13). The administrative law judge also awarded claimant medical

benefits under Section 7 of the Act, 33 U.S.C. §907.

Thereafter, claimant's counsel submitted a fee petition to the administrative law judge, requesting an attorney's fee of \$5,102.04, representing 20.125 hours of services at \$125 per hour, and \$2,585.79 in expenses. Employer filed objections to the fee request. In a Supplemental Decision and Order, the administrative law judge reduced the hourly rate sought to \$110 and the number of hours sought by 6.375. The administrative law judge awarded claimant's counsel a fee of \$1,512.50, representing 13.75 hours of services at \$110 per hour, plus \$2,585.79 in expenses, for a total fee award of \$4,098.29.

On appeal, employer challenges the administrative law judge's award of an attorney's fee, incorporating by reference the objections it made below into its appellate brief. Claimant responds, urging affirmance of the fee award.

Employer contends that the fee awarded is excessive, maintaining that the case was routine and uncontested. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132, which provides that the award of any attorney's fee approved shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). In the instant case, the administrative law judge agreed with employer's objection that the requested hourly rate of \$125 was too high in light of the lack of complex issues, and he awarded an hourly rate of \$110. We reject employer's argument on appeal that the fee should be further reduced based on this criterion because employer has not satisfied its burden of showing that the administrative law judge abused his discretion in awarding a fee based on an hourly rate of \$110. *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993). Contrary to employer's contention, moreover, this was not an uncontested case, as employer did not voluntarily pay compensation.

Employer also contends that the awarded fee is excessive because the award of benefits is "nominal," and it challenges the award of expenses. Employer did not raise these contentions below, and may not raise them for the first time on appeal.¹ *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in pertinent part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

We also reject employer's contention that the awarded hourly rate is excessive; employer asserts that an hourly rate of \$80 to \$85 for Mr. Lomax and \$70 to \$75 for his associates would be more reasonable. The administrative law judge determined that the hourly rate of \$125 sought by

¹For the reasons stated in *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993), we reject employer's reliance on *Cuevas v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1451 (Sep. 27, 1991)(unpub.) in support of its assertion that the fee awarded is excessive. *See also Lopez v. Southern Stevedores*, 23 BRBS 295, 300, n. 2 (1990).

claimant's counsel was excessive and awarded an hourly rate of \$110 based on the relevant factors set forth in the applicable regulation. As employer's mere assertion that the awarded rate does not conform to the reasonable and customary charges in the area where this claim arose is insufficient to meet its burden of proving that the rate is excessive, we affirm the hourly rate awarded by the administrative law judge to counsel. *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Employer additionally challenges the number of hours requested by claimant's counsel and approved by the administrative law judge.² In this regard, employer contends that the time spent in certain discovery-related activities and in reviewing and preparing various legal documents was either unnecessary or excessive. In considering counsel's fee petition, the administrative law judge set forth employer's specific objections, reduced the number of hours requested by 6.375, and determined that the remaining time requested by claimant's counsel for services rendered was both reasonable and necessary. Because employer has failed to show an abuse of discretion by the administrative law judge in awarding time for these services, having specifically considered employer's objections, we reject these item-specific contentions and decline to further reduce the administrative law judge's award. *See generally Watkins*, 26 BRBS at 179; *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991).

Lastly, employer objects to counsel's billing one quarter-hour for routine letters. In its unpublished order in *Ingalls v. Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990), the United States Court of Appeals for the Fifth Circuit stated that, generally, attorneys should bill no more than one-eighth hour for review of a one-page letter and one-quarter hour for writing a one-page letter. The Fifth Circuit recently stated that this fee order is considered to be circuit precedent which must be followed. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995)(unpub.). The administrative law judge reduced entries for time spent reviewing letters on three different dates, June 21, 1989; August 20, 1989; and December 10, 1989 from one-quarter hour to one-eighth hour in compliance with *Fairley* and *Biggs*. Therefore, these entries need not be further reduced. The administrative law judge acted within his discretion in not reducing the other entries to which employer objected as they are within the criteria enunciated by the Fifth Circuit.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

²We reject employer's argument that the administrative law judge must base his fee award in this case upon the decision rendered by another administrative law judge in *Cox v. Ingalls Shipbuilding, Inc.*, 88-LHC-3335 (Sep. 5, 1991), as fees for legal services must be approved at each level of the proceedings by the tribunal before which work was performed. 33 U.S.C. §928(c); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying in part on recon.* 28 BRBS 27 (1994).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge